

**Attachment 2: Resource Action Separation Agreement**

You are being offered payments and benefits as part of a resource action that you otherwise would not have been entitled to receive. You will receive and be entitled to keep these payments and benefits only if you accept and comply with all terms of this Agreement. This Agreement requires you to release IBM and related parties from claims you may have as described below. This Agreement also requires you to arbitrate certain claims that are not released on an individual basis.

By accepting this Agreement and the benefits and payments it provides, you agree that if you choose to pursue certain claims that are not released under this Agreement, then such claims must be submitted to arbitration on an individual basis as provided below and may not be pursued in court.

You should thoroughly review and understand the effect of this Agreement before you accept it.

The Resource Action Summary Plan Description is the only document that describes your eligibility for the payments and benefits you are being offered under this Agreement. Any other written or oral representations, promises, or other agreements of any kind made to you in connection with your decision to accept this Agreement will not be recognized.

**1. Definitions of certain words used in this agreement**

For purposes of this Agreement and its attachment, certain words have specific definitions.

- "Agreement" means this Separation Agreement.
- "IBM" means International Business Machines Corporation and all of its subsidiary and affiliated companies and all of their respective former or current directors, officers, employees, agents, and benefits plans (and fiduciaries, insurers or other agents of those plans), and all successors and assigns of these entities or individuals.
- "You" or "your" means you and anyone acting as your representative, successor or heir.
- "Release" means your waiver of claims as specified below.

**2. What you release by accepting this agreement**

By accepting this Agreement you release IBM from ALL claims that you may have against it at the time of accepting, whether or not related to your employment with IBM or the termination of your employment (EXCEPT FOR THOSE SPECIFICALLY IDENTIFIED IN SECTION 3), and including, without limitation:

- all claims arising under any federal, state, local or foreign law dealing with or regulating employment, including, but not limited to: (1) laws prohibiting discrimination and/or harassment based on race, national origin, ancestry, color, creed, religion, sex, gender, sexual orientation, gender identity and/or expression, genetic information, pregnancy, marital status, disability, medical condition, veteran status, or any other statutorily protected status, as well as claims in any forum alleging retaliation; (2) family and medical leave; (3) claims arising under the Employee Retirement Income Security Act of 1974 ("ERISA"); and (4) all waivable claims related to wages and hours, including under state or local labor or wage payment laws
- all state and local laws prohibiting discrimination on the basis of age
- claims based on contract, tort, or any other legal theory
- all claims whether or not you know about them at the time you accept this Agreement
- any right to raise or pursue any internal appeals, including but not limited to those eligible for review under the IBM Open Door and Panel Review Programs related to a claim that you release under this Agreement
- if you have worked or are working in California, you expressly agree to waive the protection of section 1542 of the California Civil Code because you are releasing all claims, whether they are known or unknown; Section 1542 of the California Civil Code states:
  - "A general release does not extend to claims which a creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."
  - In the event that you do not understand the waiver of your rights under section 1542 or its legal effect on you, you should talk to a lawyer.

### **3. What you do not release by accepting this agreement**

By accepting this Agreement, you do not release:

- any claims that arise after the date you accept this Agreement
- any claims that by law cannot be waived by private agreement without judicial or governmental supervision, such as under the federal Fair Labor Standards Act of 1938, provided however such claims are subject to arbitration on an individual basis as described below
- any claims that IBM failed to pay wages that IBM acknowledged were due and owing at the time you accept this Agreement
- your right to file a charge with or participate in any investigation or proceeding conducted by the U.S. Equal Employment Opportunity Commission (EEOC) or other government agency; even though you can file a charge or participate in an investigation or proceeding conducted by the EEOC or other government agency, by accepting this Agreement you are waiving your ability to obtain relief of any kind from IBM to the extent permitted by law. **Notwithstanding the foregoing, you are not prohibited from receiving an award for information provided to any government agency as permitted under law.**
- your non-forfeitable rights to accrued benefits (within the meaning of sections 203 and 204 of the Employee Retirement Income Security Act of 1974) under the IBM Personal Pension Plan, the IBM Retirement Plan and the IBM 401(k) Plus Plan
- any right you may have to challenge the validity of this Agreement
- your right to enforce this Agreement and to receive the benefits and payments pursuant to the Resource Action Plan
- any claim under the Federal Age Discrimination in Employment Act of 1967 or the West Virginia Human Rights Act, provided however such claims are subject to arbitration on an individual basis as described below
- your ability to comply with any lawful subpoena or court order or taking any other actions affirmatively authorized by law.

### **4. You can take up to 30 days before accepting this agreement**

You can take up to thirty (30) days from the date you received this Agreement (even if your employment will end sooner) or until your last date of employment, whichever is longer, to consider this Agreement and the accompanying separation program information. If you accept this Agreement before the expiration of the 30-day period, you acknowledge that you knowingly and voluntarily waived the ability to wait the full 30 days. Employees may not accept the Agreement before their last date of employment with IBM.

**FOR EMPLOYEES WORKING IN MINNESOTA ONLY:** this Agreement is not effective for FIFTEEN DAYS after you accept it. You can revoke this Agreement during that time. To revoke this Agreement, your manager or the Project Office must receive a written notice of revocation from you within that time period. You understand that if you do revoke, you will not be entitled to any payments or benefits under this Agreement or the resource action.

### **5. Arbitration and waiver of class claims and jury trial**

You agree that any and all legal claims or disputes between you and IBM under the federal Age Discrimination in Employment Act of 1967 (ADEA) or the West Virginia Human Rights Act, as well as any and all claims or disputes between you and IBM that have not or cannot be released by private agreement as a matter of law (such as under the federal Fair Labor Standards Act of 1938 (FLSA)) (collectively "Covered Claims") will be resolved on an individual basis by private, confidential, final and binding arbitration according to the IBM Arbitration Procedures and Collective Action Waiver (which are attached and incorporated as part of this Agreement) and under the auspices of JAMS, or if there is no JAMS office within 100 miles of your most recent assigned IBM office location, then an arbitration forum provider to be mutually agreed to by the parties. Regardless of the designated arbitration administrator, the arbitration shall be held in accordance with the JAMS Employment Arbitration Rules & Procedures. You understand and agree that you are giving up your right to a court action for Covered Claims, including any right to a trial before a judge or jury in federal or state court. This agreement to arbitrate does not apply to government agency proceedings.

To the maximum extent permitted by applicable law, you agree that no Covered Claims may be initiated, maintained, heard or determined on a class action, collective action or multi-party basis either in court or in arbitration, and that you are not entitled to serve or participate as a class action member or representative or collective action member or representative or receive any recovery from a class or collective action involving any Covered Claims either in court or in arbitration.

You further agree that if you are included within any class action or collective action in court or in arbitration involving a Covered Claim, you will take all steps necessary to opt-out of the action or refrain from opting in, as the case may be. Any issue concerning the validity or enforceability of this Agreement, including the class action or collective action waivers contained in this section, shall be decided only by a court of competent jurisdiction. Any issue concerning the arbitrability of a particular issue or claim pursuant to this section (except for issues concerning the enforceability of the class action or collective action waivers) must be resolved by the arbitrator and not a court.

This arbitration agreement shall not prohibit applications for temporary or preliminary injunctive relief in aid of arbitration or for the maintenance of the status quo pending arbitration. Your agreement to arbitrate certain claims pursuant to this Agreement shall not prohibit you from filing a charge or complaint with and seeking relief from the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board, the U.S. Department of Labor, the Occupational Safety and Health Commission, or any other federal, state or local administrative agency concerning claims that are not released under this Agreement.

This agreement to arbitrate claims shall be governed by and interpreted in accordance with the Federal Arbitration Act ("FAA"). If for any reason the FAA is held inapplicable to this Agreement, then the State of New York's law of arbitrability shall apply.

## **6. Enforceability**

If any part of this Agreement other than the class action or collective action waiver is held to be invalid or unenforceable, the remaining provisions of this Agreement will not be affected in any way, except that if your release of claims or agreement to arbitrate Covered Claims is held to be unenforceable, then at its option IBM may seek to recover to the maximum extent permitted by law the payments and value of benefits that you received under this Agreement. If the class action or collective action waiver provisions associated with a Covered Claim are held to be invalid or unenforceable, then any class action or collective action involving such Covered Claim(s) must be brought in court and not in arbitration.

Except as otherwise noted, this Agreement will be governed by the substantive laws of New York.

By accepting this Agreement, you acknowledge that you fully understand any and all rights you have with respect to the claims you are releasing and your agreement to arbitrate Covered Claims. You agree that the payments and benefits you have or will receive under this Agreement are good and valuable consideration for entering into this Agreement. You acknowledge that you have been provided adequate time to consult with a lawyer or other advisor of your own choosing before entering into this Agreement. You further agree that you are voluntarily signing this Agreement without any threats, coercion or duress, whether economic or otherwise, and that you intend to be bound by the terms of this Agreement.

**YOU ARE ADVISED TO CONSULT WITH A LAWYER BEFORE YOU ACCEPT THIS AGREEMENT**

Employee Name (print): \_\_\_\_\_

Serial #: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

### **Attachment 3: Arbitration Procedure and Collective Action Waiver (Attachment to Separation Agreement)**

IBM is committed to administering its employment policies fairly and treating all employees with respect and dignity. Occasionally, however, disagreements may arise between an individual employee and IBM or between employees in a context that involves IBM. IBM believes that the resolution of those types of disagreements is best accomplished through internal dispute resolution processes.

For many decades, IBM employees have had several options to initiate a thorough and timely review of their work-related concerns when they are unable to reach a resolution with their managers. The IBM Open Door Process is one of these options, and IBM's experience makes us confident that it is a highly effective way to resolve employee concerns. The Open Door Process is offered as the primary dispute resolution forum for IBMers.

IBM recognizes, however, that from time to time IBM and its employees may desire an additional option to have their concerns reviewed. To that end, IBM has introduced the following Arbitration Program which is a private and confidential dispute resolution procedure in which the parties present their respective positions concerning certain claims to an impartial third-party arbitrator who determines the merits of the claims and renders a final and binding decision. The rules and procedures governing IBM's arbitration program are set forth below.

**Covered Claims:** Individuals who accept the payments and benefits of the Resource Action Plan are required to submit any and all "Covered Claims" to final and binding arbitration, and waive their right to a court action of such claims, including any right to a trial before a judge or jury in federal or state court. "Covered Claims" are any and all legal claims or disputes between the employee and IBM under the federal Age Discrimination in Employment Act of 1967 ("ADEA") or the West Virginia Human Rights Act, as well as any and all claims or disputes that have not or cannot be released by private agreement as a matter of law (such as under the federal Fair Labor Standards Act of 1938 (FLSA)).

These Arbitration Procedures shall not prohibit applications for temporary or preliminary injunctive relief in aid of arbitration or for the maintenance of the status quo pending arbitration.

**WAIVERS:** TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, YOU AND IBM AGREE THAT NO COVERED CLAIMS MAY BE INITIATED, MAINTAINED, HEARD, OR DETERMINED ON A MULTIPARTY, CLASS ACTION BASIS OR COLLECTIVE ACTION BASIS EITHER IN COURT OR IN ARBITRATION, AND THAT YOU ARE NOT ENTITLED TO SERVE OR PARTICIPATE AS A CLASS ACTION MEMBER OR REPRESENTATIVE, OR COLLECTIVE ACTION MEMBER OR REPRESENTATIVE, OR RECEIVE ANY RECOVERY FROM A CLASS OR COLLECTIVE ACTION INVOLVING COVERED CLAIMS EITHER IN COURT OR ARBITRATION. You further agree that if you are included within any class action or collective action in court or in arbitration involving a Covered Claim, you will take all steps necessary to opt-out of the action or refrain from opting in, as the case may be. Any issue concerning the validity or enforceability of any of the class action or collective action Waivers included as part of your agreement to arbitrate certain claims shall be decided only by a court of competent jurisdiction. Any issue concerning the arbitrability of a particular issue or claim (except for issues concerning the enforceability of the class action or collective action Waivers) must be resolved by the arbitrator and not a court. Your agreement to arbitrate Covered Claims does not preclude you from pursuing or participating in a class action or collective action in court where your claim is based solely on your status as a customer or an investor and does not arise out of or in any way relate to your employment relationship with the Company.

#### **Pre-Arbitration Dispute Resolution**

You are strongly encouraged to first resolve any Covered Claims informally through the IBM Open Door Process ([Appeals@us.ibm.com](mailto:Appeals@us.ibm.com)) or the Project Office. If you are not satisfied and wish to pursue your matter further, then you are encouraged to request a mediation wherein you and IBM will attempt to find common ground to voluntarily resolve your Covered Claims with the aid of a neutral third party not employed by IBM. You can request mediation through the IBM Open Door Process by contacting [Appeals@us.ibm.com](mailto:Appeals@us.ibm.com). If mediation does not result in resolution of your Covered Claims, then you still have the option of pursuing arbitration by following the procedures set forth below.

### **Arbitration Procedures**

Covered Claims will be resolved by arbitration conducted under the auspices of JAMS, or if there is no JAMS office within 100 miles of your most recent assigned IBM office location, then an arbitration forum provider to be mutually agreed to by the parties in writing. Regardless of the designated arbitration administrator, the arbitration shall be held in accordance with the JAMS Employment Arbitration Rules & Procedures (and no other rules), which are currently available at <http://www.jamsadr.com/rules-employment-arbitration>. IBM will supply you with a printed copy of those rules upon your request. The arbitration shall be conducted before a single arbitrator unless all parties to the arbitration agree otherwise in writing. Arbitration shall be held in the county in which you worked or work for IBM at the time the claim arose, or if not possible, in the county closest to such location. To the extent any of the terms, conditions or requirements of the arbitration procedures in this document conflict with the applicable Arbitration Rules, the terms, conditions or requirements of the procedures in this document shall govern.

In any arbitration, the parties may file and the arbitrator shall hear and decide at any point in the proceeding motions permitted by the Federal Rules of Civil Procedure, including by not limited to motions to compel discovery, motions for protective orders, motions to dismiss, motions for summary judgment, and motions in limine, but not motions to consolidate claims, parties or actions. The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted. The Arbitrator is without jurisdiction to apply any different substantive law or law of remedies. The Federal Rules of Evidence shall apply. Arbitrators are required to issue a written award, and their award shall be final and binding. Any judgment or award issued by an arbitrator may be entered in any court of competent jurisdiction.

### **Reconsideration and Review**

Either party shall have the right, within twenty (20) days of issuance of the Arbitrator's decision, to file with the Arbitrator (and the Arbitrator shall have jurisdiction to consider and rule upon) a motion to reconsider (accompanied by a supporting brief), and the other party shall have twenty (20) days from the date of the motion to respond. The Arbitrator thereupon shall reconsider the issues raised by the motion and, promptly, either confirm or change the decision, which (except as provided by law) shall then be final and conclusive upon the parties.

Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award.

### **Remedies**

You and IBM agree the arbitrator(s) is authorized to award any party the full remedies that would be available to such party if the Covered Claim had been filed in a court of competent jurisdiction, including attorneys' fees and expert fees and costs, to the same extent as would a court under applicable law.

### **Time Limits and Procedure for Initiating Arbitration**

To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern through the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

To initiate arbitration, you must pay the equivalent of the filing fee for the court of general jurisdiction in the state where you last worked for IBM. IBM shall pay 100 percent of the required arbitration administration fee in excess of your payment.

The written demand for arbitration shall be submitted to the IBM Arbitration Coordinator, IBM Corporate Litigation, North Castle Drive, Armonk, New York 10504, with a check for your payment of the filing fee made payable to "International Business Machines Corporation."

Your written demand shall set forth the dispute, including the alleged act or omission at issue and the names of all persons allegedly involved in the act or omission; your name, address, telephone number, and email address; and your IBM employee serial number. IBM will promptly file the demand with the appropriate arbitration administrator, together with the applicable administrative fee as provided in the arbitration administrator's fee schedule.

**Representation**

Any party may be represented by an attorney for purposes of arbitrating a Covered Claim. Each party is responsible for payment of its own costs and attorneys' fees, unless otherwise awarded by the Arbitrator under the standards provided by law.

**Discovery**

Each party shall have the right to take depositions of three fact witnesses and any expert witness designated by another party. Each party also shall have the right to make requests for production of documents to any party and to subpoena documents from third parties to the extent allowed by law. Requests for additional depositions or discovery may be made to the Arbitrator selected pursuant to this Agreement. The Arbitrator may grant such additional discovery if the Arbitrator finds that the party has demonstrated that it needs that discovery to adequately arbitrate the claim, taking into account the parties' mutual desire to have a speedy, less-formal, cost-effective dispute-resolution mechanism.

**Privacy and Confidentiality**

Privacy and confidentiality are important aspects of arbitration. Only parties, their representatives, witnesses and necessary administrative staff of the arbitration forum may attend the arbitration hearing. The arbitrator may exclude any non-party from any part of a hearing.

To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

**Designation of Witnesses**

At least 30 days before the arbitration, the parties must exchange lists of witnesses, including any experts, and copies of all exhibits intended to be used at the arbitration.

**Subpoenas**

Each party shall have the right to subpoena witnesses and documents to the extent allowed by law, subject to any limitations the Arbitrator shall impose for good cause shown.